

The Climate Show – Episode 26

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Transcript

00:00:04 Linnéa Nordlander

Hi and welcome to the Climate Show, a podcast that explores the law and politics of climate change.

00:00:09 Linnéa Nordlander

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00:00:16 Linnéa Nordlander

Hi we are Beatriz Martinez, and Linneá Nordlander. And Alessandro Monti.

00:00:20 Beatriz Romera

And we are your host at the climate show

00:00:25 Beatriz Romera

In today's episode, we explore the relationship between the ocean and climate change and the landmark biodiversity beyond national jurisdiction BBNJ agreement. The ocean is a vital carbon sink that absorbs over 25% of global CO2 emissions and 90% of excess heat.

00:00:42 Beatriz Romera

But its capacity is increasingly threatened by amounts of overfishing, pollution and climate change.

00:00:49 Linnéa Nordlander

The BBNJ agreement can play an important role in preserving marine ecosystems that sequester carbon and regulate the Earth's climate. The BBNJ seeks to protect biodiversity and areas of the ocean beyond national jurisdiction, which make up around 2/3 of the global ocean. By safeguarding ocean ecosystems, the Treaty supports the Ocean's essential.

00:01:09 Linnéa Nordlander

Climate functions and fosters global cooperation on marine protection.

00:01:14 Beatriz Romera

Today, Federica Catonini, PhD fellow at CLIMA talks with Professor Vito De Lucia about BBNJ's potential to conserve and enhance ocean carbon sinks. Enjoy the show.

00:01:33 Federica Catonini

We're here today with Vito de Lucia, professor at and director of the Norwegian Center for the Law of the Sea at the Arctic University of Tromsø.

00:01:42 Federica Catonini

Vito is a well-known expert of international environmental law and the law of the sea. His research interests are located at the intersection of critical theory, law and ecology, among other things, He is also principal investigator for a project funded by the Norwegian Research Council, called Future Arctic Law and Governance, of which CLIMA is also a partner.

00:02:02 Federica Catonini

Today, we're going to talk about the relationship between ocean and climate change law, focusing on the agreement under the United Nations Convention on the Law of the sea

00:02:10 Federica Catonini

On the conservation and sustainable use of marine biological diversity or variants beyond national jurisdiction, known as the BBNJ agreement, the agreement has been adopted on 19 June 2023 and has not yet entered into force. This is a topic that is relevant to my PhD project, which looks at the interaction between the climate, Ocean and biodiversity regimes for the conservation and enhancement of ocean carbon sinks.

00:02:37 Federica Catonini

Welcome, Vito. It's such a pleasure to have you here with us today at the climate show.

00:02:42 Vito De Lucia

Thank you for having me, for the invitation.

00:02:44 Federica Catonini

Of course.

00:02:45 Federica Catonini

To start off, Vito, could you explain to our listeners what the BBNJ agreement is?

00:02:51 Vito De Lucia

Yes. So, the agreement that you already mentioned is international instrument has been negotiated and adopted with the objective of addressing the problem of conservation and sustainable use of marine biodiversity in areas beyond maturity.

00:03:08 Vito De Lucia

It is an agreement which seeks to implement some of the provisions set out in the United Nations Convention for Law of the Sea with respect to certain particular topics, as a long history negotiations started over 20 years ago was adopted, as in mentioned in June.

00:03:27 Vito De Lucia

And it's divided promoting 4 key topics, 1 is and I follow the structure the treaty text.

00:03:34 Vito De Lucia

The first one addresses the question of marine genetic resources in Areas beyond national jurisdiction, including the sharing of benefits from the utilization. The second addresses so-called Area-based management measures, including marine protected areas, so it's more strictly related to conservation the third includes questions related to environmental impact assessments for activities that somehow connect with.

00:04:01 Vito De Lucia

The marine environment, In areas beyond national jurisdiction and the fourth has to do with this to do with capacity building and technology transfer issues. So, this agreement addresses different parts of the Convention on the Law of the sea with respect to this.

00:04:20 Vito De Lucia

Four topics and then there is a set of broader general Principles.

00:04:24 Vito De Lucia

The treaty has not entered into force.

00:04:26 Vito De Lucia

So, it has been adopted.

00:04:28 Vito De Lucia

And in some countries already ratified it, but it's not into force yet, and it's the third implementing agreement of the law of the Sea Convention. which background is a, is a so-called framework Convention sets general rules and principles, and then it's implemented.

00:04:44 Vito De Lucia

Through either other implementing agreements or other mechanisms outside of it.

00:04:49 Federica Catonini

Thank you, Vito, for a good introduction to the BBNJ. If we focus a bit on the relationship now between the BBNJ and the ocean climate Nexus. As we know, awareness of the impacts of climate change on the ocean has increased. What is the role that the BBNJ can play to address these impacts?

00:05:09 Vito De Lucia

That's a good question. So, to be honest, it's a little bit unclear. So, the question of climate change during the negotiations comes up repeatedly in many of the specific negotiating contexts in relation to.

00:05:27 Vito De Lucia

Different topics, both at the general level. So, at the general objectives, the preambular negotiations included a lot of you know discussions to whether there should be reference to climate change in order to contextualize the operational scope of the Treaty.

00:05:48 Vito De Lucia

And what this reference should be? And there's been a lot of disagreements in respect to some of this terminology and inclusion, some reference to climate change. It's always difficult, I would say, to see how.

00:06:03 Vito De Lucia

One legal instrument which addresses a specific set of issues may contribute to the achievement objectives that are addressed by another legal instrument for any number of problems. Some of these have been discussed in the recent Advisory Opinion, of the International Tribunal for the Law of the Sea.

00:06:23 Vito De Lucia

Precise in relation to the broader Law of the Sea regime and the Paris agreement, but obviously to have references to climate change.

00:06:35 Vito De Lucia

But broadly speaking, more in terms of specific issues can facilitate the inclusion of certain concerns when 1 adopts measures under the specific context of the BBNJ agreement. So, but much will depend on how any of the provisions, both the primary rules and the and the.

00:06:54 Vito De Lucia

Secondary rules, including the in the BBNJ Treaty, will be operationalized by the treaty bodies. Who is going to be parties to the treaty eventually. So, there's a lot of, like, variables that make it a little bit difficult to predict.

00:07:09 Federica Catonini

That makes a lot of sense if.

00:07:11 Federica Catonini

We move a bit to.

00:07:13 Federica Catonini

Climate change and carbon sinks from a climate change law perspective, the ocean is considered as a central carbon sink.

00:07:20 Federica Catonini

Likewise, climate change, as you also mentioned, is very much present in the BBNJ and in the BBNJ. Actually, there's an interesting article that relates to the ocean carbon cycle. This is Article 7 H that states that the BBNJ follows an approach that among other things and I quote, maintains and restores ecosystem integrity, including the carbon cycling services that underpin the role.

00:07:42 Federica Catonini

Of the ocean in climate unquote.

00:07:45 Federica Catonini

What do you think is the significance of this article vis-a-vis the climate regime and its objective to conserve carbon sinks as part of climate mitigation action and also what role do you think can the BBNJ play in the conservation of ocean carbon sinks?

00:08:01 Vito De Lucia

That's a very difficult question in the sense that there's a lot of like moving parts in, in, in this particular respect. So first and foremost, so the key maybe will be what BBNJ agreement can do to restore the carbon sink capacity of the ocean, which is pretty much used up and saturated. Secondly, there's an issue.

00:08:21 Vito De Lucia

That the BBNJ agreement focuses on.

00:08:24 Vito De Lucia

Only a particular jurisdiction, zoning the seas and therefore has a limited capacity to address a problem which it's global and cuts across jurisdictional boundaries, so that if any is a contribution and the agreement can make in relation to a broad set of cooperative arrangements that need to be in place.

00:08:46 Vito De Lucia

There's no time to go into details, but maybe that's probably one of the potential beneficial aspects of the BBNJ agreement because it sets out the three bodies and the tree itself as maybe as a coordinating hub with respect to what sort of was a very crowded landscape of legal regimes and.

00:09:06 Vito De Lucia

Which lacks good coordinating mechanisms

00:09:09 Vito De Lucia

Another question is to do with the fact that.

00:09:14 Vito De Lucia

The.

00:09:15 Vito De Lucia

So, the thinking of the of the ocean as a carbon sink makes perfect sense from the point of view climate.

00:09:23 Vito De Lucia

But less so.

00:09:24 Vito De Lucia

From the point of view of biodiversity conservation and in fact, and this is again, something that has been discussed by this recent advisory opinion that maybe is.

00:09:35 Vito De Lucia

Quite problematic tension between actions and may announce the ocean as a sink and action that may be detrimental to the ocean from the point of view of diversity and there's both tension in terms of that. You know **activity maintenance**, the carbon sink capacity oceans may have detrimental effect as at the at the biological level, but also there is legal tensions that may need to be resolved.

00:10:03 Vito De Lucia

And it may not necessarily be easy to do so.

00:10:08 Federica Catonini

Thank you so much Vito for mentioning this. Actually, this tension is something I'm very interested into because I'm looking into that within my PhD project as well. And you mentioned also the ITLOS advisory opinion on climate change and carbon ocean sinks enhancement, and this leads me actually to the next question that I want to ask you.

00:10:29 Federica Catonini

Because as you said, the Paris while the climate change regime and specifically Article 5, one of the Paris Agreement states that along with conservations, conservation parties should take action also to enhance.

00:10:43 Federica Catonini

Carbon sinks and among these enhancement methods, the Intergovernmental Panel on Climate Change considers carbon dioxide removal technologies, which are marine engineering technologies, as necessary to achieve net zero CO₂ and greenhouse gas emissions both globally and nationally.

00:11:01 Federica Catonini

However, this ocean based CDR technologies such as ocean fertilization or ocean alkalinity announcement may have some serious detrimental effect on marine biodiversity within and beyond national jurisdiction. And so, in your opinion, what could be the role of the BBNJ actually in regulating such activities?

00:11:21 Federica Catonini

Especially with regards to its provisions on environmental impact assessment, maybe and also what do you see as being potentially problematic in this regard. You mentioned a bit this tension. Can you elaborate a bit further?

00:11:31 Vito De Lucia

Yeah, I think this tension is real. And so, looking at it from the point of view of marine conservation on the protection, preservation of marine environment conservation biodiversity.

00:11:44 Vito De Lucia

In marine areas, so that's a potentially significant issue because all these climate interventions or you know engineering interventions have real potential to not only have the real potential to you know cause degrading effects on marine biodiversity, but also there's an element of uncertainty.

00:12:04 Vito De Lucia

Because there hasn't been really any large scale deployment of these technologies.

00:12:10 Vito De Lucia

And at the moment are regulated in terms of, you know, being environmentally damaging. So, in the context of dumping, for example, although there's a big discussion, there's a lot of pressure to open it up and you may really end up in a situation where you would have an obligation to do something in the context of the Climate Regime

00:12:31 Vito De Lucia

And you under an obligation to not do that same thing under the framework of the Law of the Sea Convention.

00:12:38 Vito De Lucia

The advisory opinion as touched upon it in terms of geo-engineering and it's also made clear that from the point of view of the Convention, what matters is the protection.

00:12:48 Vito De Lucia

Of the marine environment.

00:12:50 Vito De Lucia

But to complicate things, what in short term in a short term framework may be problematic for the for the sea, for the conservation by diversity in the longer term may actually be beneficial because.

00:13:03 Vito De Lucia

But it's really difficult and then you have all these issues related to precaution and the characterization of an activity, us polluting and need to have this you know detrimental effect and what's the temporalities of these effects you know is it you know one day one month, one year, 100 years.

00:13:23 Vito De Lucia

UM, so it's very difficult specifically with relation to the BBNJ agreement, the, the framework for environmental impact assessment, it certainly will be relevant because it sets out that even for activities that may have a minor transitory impact, there is a screening process needs to be in place.

00:13:41 Vito De Lucia

So at least it regulates. It will regulate once it enters into force. Any activity that may have even a, let's say a minor effect, or immediately the process to address the potential risks and also.

00:14:03 Vito De Lucia

It includes the consideration of cumulative impacts, which means that then the activity needs to be looked at not only in isolation but in relation of any number of other activities in space and in time that may contribute to.

00:14:16 Vito De Lucia

Exacerbating or otherwise the impact of a particular activity. So, at the end of day it is very complicated.

00:14:25 Federica Catonini

It is very complicated and yeah, as you mentioned as well, of course this when we talk about the BBNJ, we're talking just about areas beyond national jurisdictions. And as you said, there's also other instruments out there such as the Dumping Convention and protocol, the London Convention protocol regulating Ocean City area and now the problem is really that.

00:14:46 Federica Catonini

Somehow, yeah, they're trying to push it out some. Some, like the climate regime maybe is trying to take.

00:14:53 Federica Catonini

A bit on its own, this regulation of ocean CDR, and we don't know what's going to happen and how these different regimes can work together. So, thank you so much. This is definitely complicated and very interesting.

00:15:14 Federica Catonini

But I want to bring back the conversation to something a bit more.

00:15:18 Federica Catonini

Let's say on the large scale, so to round up, I would actually like to ask you about your experience at the BBJ negotiations. And I know Vito, you've been following the negotiation process, and you were there when the agreement was adopted actually. So, can you tell us actually a bit more about what you've witnessed in the negotiations and also?

00:15:39 Federica Catonini

What can they teach us more broadly in terms of international environmental law making?

00:15:44 Vito De Lucia

OK, so first of all was I was there not when agreement was adopted, which was in June, but when where, where the agreement tax was frozen which was in in March and maybe that's the most interesting part of it to speak about because usually the negotiations take place in that two week session.

00:16:05 Vito De Lucia

And there is an agenda. And then in the Friday there's supposed to be the adoption of whatever is the outcome and next steps and but in this particular time. So, this was the second.

00:16:19 Vito De Lucia

5th session. OK, let's step back. So, the regional negotiation would have 4 negotiating sessions within which then will have to be negotiated at the fourth session.

00:16:30 Vito De Lucia

The agreement could not be reached in Parliament not only because of the disruption during COVID, which kind of, you know, set back the progression quite a bit for a number of reasons, but at the, at the end of the fourth negotiation session, agreement could not be reached.

00:16:50 Vito De Lucia

So, a fifth session was.

00:16:57 Vito De Lucia

Scheduled by the UN General Assembly and then this fifth session could not produce an agreement either.

00:17:07 Vito De Lucia

And then we're, uh. So, then it was suspended.

00:17:13 Vito De Lucia

And resumed twice, the first time when the agreement then was the agreement text was frozen and the third time when the agreement was again in June 2023, adopted. But what happened in the second assumption, which was the key, the key session is that at the end of the Friday.

00:17:33 Vito De Lucia

There was no agreement. There were in fact a lot of problems still in relation to some key aspects and then negotiation basically continued overnight until the.

00:17:49 Vito De Lucia

Until the well 36 hours in, in the UN building and I wasn't there because.

00:17:58 Vito De Lucia

Only the formal delegates could participate, but a lot of NGOs and a lot of observers remain through the night, just that they cannot be part of the discussions I left.

00:18:11 Vito De Lucia

But I was up until 3:00 in the night, I was talking on messaging with some of my colleagues inside. Until then, I left and then I woke up. When I was back in Norway.

00:18:24 Vito De Lucia

And when I turned on my Wi-Fi, the first thing that came up was we have an agreement. But So, what I want to say is that.

00:18:32 Vito De Lucia

What happened there is quite significant because regardless of all the contestations which have, you know, marred the negotiations on some key points from long time, there was a significant process breakdown because negotiation went down without sleep, without food.

00:18:54 Vito De Lucia

Only in English, because at one point the interpreters had to leave, obviously, so there was a lot of significant aspects of the negotiating process leading to the agreement, which should be in fact quite interesting to look at, more in details, maybe through interviews to the participants to see.

00:19:13 Vito De Lucia

You know, as an important element of law-making.

00:19:16 Vito De Lucia

How the process may have a significant impact on the I'm just rambling, but I think this is very interesting aspect for me and I think its maybe not emphasized enough that there was a lot of textual, you know, reviews that took place with many delegates.

00:19:23 Federica Catonini

No, no, I'm sorry.

00:19:34 Vito De Lucia

Not necessarily being able to follow all the discussions that that will break down the different groups and with you know, language not being the first language which may have.

00:19:45 Vito De Lucia

And given the language is key in legal text, so a lot of interesting. There's more of a stream of consciousness, remembrance of the process which, as I said, wasn't really part of.

00:19:57 Vito De Lucia

Past a certain point but I think that's a crucial aspect of negotiation that it's.

00:20:02 Vito De Lucia

It may be.

00:20:03 Vito De Lucia

It's a lesson to keep in mind how the process is really important, sometimes even more than the outcome.

00:20:13 Federica Catonini

That's very interesting, Vito and it definitely wasn't rambling. It was very, very good to have your insights on this. Thank you so much for that. But before we say.

00:20:24 Federica Catonini

Goodbye to our listeners. So, we came to our last question. I wanted to ask you if there's anything else you wish to add, if you have any key take away or anything that you want to tell the listener of the Climate Show

00:20:36 Vito De Lucia

Oh, I'm. I'm not entirely sure what I could add

00:20:40 Vito De Lucia

Except the fact that you know many respect to BBNJ is interesting in in that it kind of places itself a bit.

00:20:52 Vito De Lucia

In between the Law of the Sea Convention, which is formally and implementing agreement, and the Convention on biological diversity of which is not an implementing agreement. However, it brings on board quite a bit of its language, its conceptual apparatus.

00:21:10 Vito De Lucia

And if we go back to the early 2000, in fact a process started in parallel within the Law of the Sea context and within the CBD context in a sub working group on marine protected areas in areas beyond national jurisdiction.

00:21:27 Vito De Lucia

And there was an important claim made by some delegations this meeting in Montecatini.

00:21:31 Vito De Lucia

A few years ago.

00:21:32 Vito De Lucia

For which Danish colleague of mine Christian Prip, in fact he was there. I think working for the Danish Government and he's done work on this. So, the process was claimed away from the CBD and into the, you know, under the umbrella of the Energy General Assembly and the law of the sea framework.

00:21:53 Vito De Lucia

And what the CBD was left for was with this EBSA you know this ecological and biological sensitive areas framework.

00:21:59 Vito De Lucia

And could only remain that as a process of, you know, scientific and technical guidance. So, I think there's also kind of interesting way to think back and like to talk about, you know, think about process and interaction between negotiations. But it really, it's going to be interesting to see how the BBNJ agreement comes.

00:22:19 Vito De Lucia

To force will bridge this relationship, which has always been a little bit problematic because of the jurisdiction limitation, the CBD in espionage and jurisdiction, and whether this will actually mean that we'll think about the sea.

00:22:34 Vito De Lucia

More from the point of view of, you know, the CBD than actually from the point of view of the marine environment and whether that's a good thing.

00:22:42 Vito De Lucia

And that's not clear.

00:22:45 Federica Catonini

OK. Thank you so much, Vito for your insight, for, for your insights, for today's conversation. It was really, it's been a tremendous pleasure actually to have you here.

00:22:57 Vito De Lucia

It's my pleasure.

00:22:57 Federica Catonini

Yes.

00:22:58 Federica Catonini

And very much looking forward to continuing our conversation on this and also our collaboration between CLIMA and also the Norwegian Center for the Law of the Sea. And I also hope to see you back in Copenhagen soon.

00:23:11

Yes.

00:23:11 Vito De Lucia

Me too. Thank you, Federica.

00:23:13 Federica Catonini

Of course, and to our listeners of the climate show, we hope you enjoyed this episode and stay tuned for more.

00:23:23 Linnéa Nordlander

Thank you for listening to this episode of the Climate Show. If you would like to read more about Professor Vito de Lucia's work, check out the link in the show notes. Stay tuned for our next episode.